

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CONSTANCE LaPENNA AND FRANK LaPENNA, OFFICERS OF LaPENNA ELECTRIC CONTRACTORS, INC.	:	DETERMINATION
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1983 through May 31, 1984.	:	

Petitioners, Constance LaPenna and Frank LaPenna, officers of LaPenna Electric Contractors, Inc., 18 Sunrise Drive, Middletown, New York 10940, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through May 31, 1984 (File Nos. 802497 and 802498).

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 24, 1989 at 2:45 P.M., with all briefs to be submitted by October 13, 1989. Petitioners appeared by Bull, Morreale, Judelson & Clancy (John M. Clancy, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether petitioners were persons required to collect sales and use taxes on behalf of LaPenna Electric Contractors, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue herein.

FINDINGS OF FACT

LaPenna Electric Contractors, Inc. (hereinafter "the corporation") operated an electrical contracting business at 14 Rondack Road, Middletown, New York 10940. The corporation began business in November 1976 and filed for bankruptcy in 1984.

On June 14 and 17, 1985, the Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due to petitioner Constance LaPenna spanning, together, the period June 1, 1983 through May 31, 1984 and assessing a sales tax liability in the aggregate amount of \$7,322.64, plus penalty (Tax Law § 1145[a][1]) and interest. On June 17, 1985, the Division of Taxation issued two additional notices of determination and demands for payment of sales and use taxes due spanning the same period and assessing the same amounts as above, against petitioner Frank LaPenna. All notices indicated that the amount of tax due was owed by the corporation and that the petitioners were being assessed as persons required to collect and remit taxes on behalf of the corporation because they were officers of such

corporation.

The amount of tax due for the quarters ended August 31, 1983 and November 30, 1983 was based upon the sales tax returns as filed by the corporation without full payment of the tax reported to be due thereon. The amount of tax due for the quarters ended February 29, 1984 and May 31, 1984 was based upon the average taxable sales as reported on previous returns filed, as no sales tax returns had been filed for these periods.

Subsequent to the issuance of the notices of determination, the corporation late filed sales tax returns for the quarters ended February 29, 1984 and May 31, 1984. The tax shown due was not remitted with the sales tax returns. At a Tax Appeals Bureau conference, the total tax due was reduced to reflect the amounts shown on the filed sales tax returns. The amount now in issue is as follows:

<u>Quarter Ended</u>	<u>Tax</u>
August 31, 1983	\$ 251.65
November 30, 1983	1,875.79
February 29, 1984	910.06
May 31, 1984	1,585.84
TOTAL	\$4,623.34

Constance LaPenna was the president and a shareholder of the corporation during the period in issue. Her name, title, social security number and address appear on the Certificate of Sales Tax Registration form filed by the corporation with the Division of Taxation. On March 15, 1984, Constance LaPenna signed, as president, a New York State Application for Three-Month Extension for Filing Tax Report, Form CT-5, for the corporation for the year 1983. Her husband, Frank LaPenna, was the vice-president, secretary and a shareholder of the corporation during the period in issue. His name, title, social security number and address also appear on the Certificate of Sales Tax Registration form filed by the corporation with the Division of Taxation. On May 3, 1983, Frank LaPenna signed, as vice-president, the corporation's Corporation Franchise Tax Report, Form CT-3, for the year 1981.

Mr. and Mrs. LaPenna became involved in the corporation at the behest of their son, James LaPenna. As a card carrying member of an electrical contractors union, James LaPenna was precluded from owning or operating an electrical contracting business. He therefore requested that his parents be the officers and shareholders of record of the corporation and that their home address be used as the address of the business. Prior to the corporation, Mr. and Mrs. LaPenna never had any involvement with an electrical contracting business. Mrs. LaPenna was a sales clerk in a department store before her retirement in 1966. Mr. LaPenna was a cook in a training school for boys before his retirement in 1978.

During the years at issue, neither petitioner had any duties or responsibilities with regard to the operation of the corporation. They had no authority to hire or fire employees or to negotiate contracts. They signed tax returns only at the request of their son, but did not participate in their preparation. They never signed checks or other corporate documents. Mr. and Mrs. LaPenna were unaware of the income, payroll, books and records and bank statements of the corporation. They never participated in discussions or meetings concerning the operation of the business or which creditors to pay. Mr. and Mrs. LaPenna did not receive any earnings or dividends from the corporation during its existence. The visits made by petitioners to the business premises, located in the dining room of the home of James LaPenna and his wife Mary Jo LaPenna, were for personal, not business, reasons.

During the period in issue, James LaPenna operated the business. In addition, he drafted

checks, negotiated and executed contracts and decided which creditors were to be paid. Along with his wife, Mary Jo LaPenna, he signed the sales tax returns filed for the period in issue. The corporation had one office employee, a secretary/bookkeeper, who answered the telephone, ordered supplies, handled the payroll and made entries into the monthly ledger. The secretary/bookkeeper was hired by and reported to James LaPenna.

CONCLUSIONS OF LAW

A. In general, Tax Law § 1133(a) imposes upon any person required to collect tax imposed by Article 28, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

B. In Matter of Autex Corporation (Tax Appeals Tribunal, November 23, 1988), the Tax Appeals Tribunal summarized the factors which are considered in determining whether an individual is responsible for the sales and use taxes due from a corporation as follows:

"The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183). Factors stated by the Division's regulations are whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 391). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations' (Vogel v. NY Tax & Finance, supra, at 226)."

C. Applying these criteria to the instant matter leads to the conclusion that petitioners were not persons required to collect tax on behalf of the corporation. Although petitioners apparently had the authority to sign tax returns, they did so only at the direction and request of their son. Petitioners were not responsible for maintaining the corporate books or for the management of the corporation. They did not have the authority to hire or fire employees or have any responsibility or involvement with the financial affairs of the corporation. In addition, they received no benefits from the corporation's profits during the duration of its existence. Lastly, it is significant that petitioners were not engaged in the preparation and filing of the corporation's sales and use tax returns and did not draft checks on behalf of the corporation. Therefore, petitioners were not persons required to collect and pay over sales taxes on behalf of the corporation for the period June 1, 1983 through May 31, 1984.

D. The petitions of Constance LaPenna and Frank LaPenna, officers of LaPenna Electric Contractors, Inc., are granted and the notices of determination and demands for payment of sales and use taxes due, dated June 14 and 17, 1985, are cancelled.

DATED: Troy, New York
November 30, 1989

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE